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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

VANCOUVER STEAMSHIP COMPANY, LTD.,
a Corporation,
Petitioner,

v.

THERESA RICE, Administratrix of the Estate of
Vincent Catino, Deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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TO THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Vancouver Steamship Company, Ltd., relying upon Title 28, Sec. 347, U. S. C. A. (Sec. 240 of the Judicial Code) to sustain the jurisdiction of this Court, respectfully shows to this Honorable Court as follows:

The petitioner is a corporation of British Columbia and is the owner of the steamship "City of Vancouver." While that ship was loading in the Columbia River at Westport, Oregon, on December 1, 1929, a longshoreman, Vincent Catino, was injured on shipboard, carried ashore, and died ashore one hour later. He was not an employee of the ship, but of the contracting stevedores who were loading her. Subsequently Theresa

Rice, the respondent, was appointed administratrix of his estate, and filed a libel against the ship in rem in the District Court of the United States for the District of Oregon. Your petitioner appeared in that case and claimed the ship as owner, and excepted to the libel on the ground that the admiralty court was without jurisdiction. The point of the exception is this: The Oregon "death statute", under which the suit was brought, is not a "survival act" and no right of action arises under it until death actually occurs; and, death occurring, the right which the injured man had dies with him, and a new, distinct and different cause of action arises in the person of his administrator for the benefit of his estate; and, since in this case that new cause of action arose on land (death occurring ashore), and the tort and damage were thus consummated there, the admiralty court was without jurisdiction. The exception was sustained by the District Court and a decree entered dismissing the libel. R. 14. From this decree libelant appealed to the Circuit Court of Appeals for the Ninth Circuit and that court, one judge dissenting, reversed the decree of the District Court and held that the admiralty had jurisdiction. R. 29-35. This was a final determination of the point involved, and is the only error relied on. The date of the opinion of the Circuit Court of Appeals was August 15, 1932, and the mandate has been stayed pending the filing of this petition.

Since we believe the question can be better presented to your Honors by incorporating shortly in the petition itself our reasons therefor, rather than in an accompaning brief, we adopt that course. And, as the doctrine we contend for and the ground underlying it are clearly and succinctly stated by Hughes in his

work on Admiralty, we begin by quoting what he there says:

"*Fatal Injury on Water—Death Ashore.*

"In discussing the bounds of amiralty jurisdiction in tort, it has been seen that where the cause of action is consummated on the water, admiralty has jurisdiction, though additional injuries immediately following on land may aggravate the damages, and that on the other hand, where the cause of action is consummate only on land, admiralty has no jurisdiction, although the injury originated on water.

"The application of this doctrine to the case of a person injured fatally on a ship, but not dying till after he has been carried ashore, depends—or ought to depend—on the character of the state statute giving the right.

"It is well known that state statutes giving this right of action fall under two classes. One class recognizes the right of the deceased to sue for the injury inflicted, and provides that such right of action, vesting independent of statute in the deceased, shall survive, thus simply abolishing the common-law rule that a personal right of action dies with the person. The Massachusetts and Louisiana statutes may be taken as types of this class, and these are called 'survival acts.'

"Another type gives an entirely new right of action to the parties injured by the death, such as dependents, for the loss to them by reason of the death, independent of any right of action to the deceased. Lord Campbell's Act in England, which was the prototype of these statutes, and the Virginia statute, are good illustrations of this type. These are usually designated as 'death acts.'

"It is obvious that under a survival act the right of action is consummate when the fatal injury is inflicted, and that the subsequent suffering and death are only cumulative.

"It is equally obvious that under a death act the right of action is not consummate till death occurs."

"Hence, in a case arising under a survival act, admiralty ought to have jurisdiction, though the death occurred on land.

"And in a case arising under a death act, admiralty ought not to have jurisdiction, where the death occurred on land.

"Accordingly, in Ryley v. Philadelphia & R. R. Co., Judge Adams held that admiralty had no jurisdiction in a case turning on the Pennsylvania statute (a death statute) where the injured party died on shore.

"And in Hamburg-Amerikanische Packetfahrt Aktien Gessellschaft v. Gye, the Circuit Court of Appeals for the Fifth Circuit held, in a case arising under the Louisiana statute (a survival statute), that there was jurisdiction.

"This case was followed in the Anglo-Patagonian by the Circuit Court of Appeal for the Fourth Circuit, in a case arising under the Virginia statute (a death statute), overlooking the radical difference between the Louisiana and Virginia statutes." *Hughes on Admiralty*, 2nd Ed., pp. 234-236.

Since the Oregon statute is conceded on all hands to be a "death statute" and not a "survival act," and has been frequently so interpreted by the Oregon Supreme Court, Judge Robert S. Bean of the United States

District Court for Oregon followed Mr. Hughes in the *"Kaian Maru,"* 2 Fed. (2d) 121. He there said:

> "The action is brought under section 380 of the Oregon statute, which has been construed by the Supreme Court of this state to be a death and not a survival statute. In other words, the original injury does not survive to the executor. The action authorized by the statute is for a death, to recover the damages resulting to an estate, and therefore, as the cause of action upon which this suit is based arose on land, and not on water, the authorities seem to be that an admiralty court has no jurisdiction. In cases where the cause of action by statute survives, an admiralty court would, under those circumstances, have jurisdiction, because, if an injury occurs on water and is aggravated by subsequent acts on land, it does not deprive the admiralty court of jurisdiction over the case; but where the cause of action arises on land an admiralty court has no jurisdiction. In this case the cause of action did arise on land, because it is for the death of the decedent, and not for the injury that he received aboard the boat. I conclude, therefore, that an admiralty court is without jurisdiction." *The Kaian Maru*, 2 Fed. 2nd 121.

This decision of Judge Bean has been the accepted law in Oregon until the present decision of the Circuit Court of Appeals in the instant case.

In *Ryley v. Philadelphia R. R. Co.*, 173 Fed. 839, one of the cases referred to by Mr. Hughes, Judge Adams in the Southern District of New York, in a case identical with the present one, said:

> "In the admiralty it has become well settled that where damages or death occur, it is not sufficient

that the wrong originated upon the water. If it was not consummated upon the water, jurisdiction does not exist." Citing the Plymouth, 3 Wall, 20, 34; 18 L. Ed. 125. And concluded: "This has been followed in numerous cases and may be regarded as settled law." pp. 841-842.

We do not quote his opinion at length, but commend it for its very apt and concise quotations from other pertinent cases.

Rundell v. LaCampagnie Generale Transatlantique, 100 Fed. 655, is a decision of the Circuit Court of Appeals of the Seventh Circuit, and therefore important as illustrating that the Circuit Courts of Appeals are not in agreement on this question. In that case Rundell's intestate was drowned at sea in the wreck of the French ship "La Burgoyne." It was admitted that the admiralty law gave no right of action for death upon the high seas, but was contended that the law of the French flag, which did give such right, extended beyond the rail of the ship and covered drowning caused by a wrong originating on the ship herself, namely, faulty navigation. The court refused to accept this contention and held that the faulty navigation was *damnum absque injuria*, that no right of action arose until death occurred, and that, since death occurred beyond the boundaries of the ship, the law of the flag was of no avail. The substance of the opinion is in the following quotation therefrom:

> "*The locus of the tort, therefore, which must always be determined by the place where the injury and damage arise, rather than where the negligent act is committed*, must be considered as being upon the high seas, rather than upon French territory, supposing that the flying of the French flag made

the vessel French territory while upon the high seas, as is claimed. *The place where the death occurred and the damage arose must be held to be the locus in quo. The damage is the substance and consummation of the injury, and from that alone springs the right of recovery.*" (Citing the Plymouth and other authorities.)

The latest death case we have found is *Pickles v. Leyland*, 10 Fed. (2d) 371, where Judge Lowell in the Massachusetts District followed Judge Bean in the "Kaian Maru," and said, significantly, on page 372:

"As to Hamburg-American Packet Co. v. Gye, 207 F. 247, 124 C. C. A. 517, and The Anglo-Patagonian, 235 F. 92, 148 C. C. A. 586, see Hughes, Admiralty, 2nd Ed. p. 236."

Judge Brown of the Southern District of New York has always been recognized as one of the great admiralty judges of the country. He said in the "*City of Lincoln*," 25 Fed. 835:

"In every action for a tort of this kind there must be both negligence and damage; neither alone constitutes a cause of action. If the negligence originates in one place, and the damage is sustained in another, some rule is necessary in order to determine the *locus* of the tort. The supreme court, in the case of The Plymouth, 3 Wall 26, and in other cases, have adjudged that the criterion is the place 'where the substance and consummation of the injury' are effected. So in 1 Hawk. P. C. c. 37, Sec. 17, it was decided that where A., standing on the shore of a harbor, fired a loaded musket at a revenue cutter, which had struck upon a sand-bank, in the sea, about 100 yards from the shore, by which firing a person

was maliciously killed on board the vessel, it was piracy; for the offense was committed where the death happened, and not at the place from whence the cause of death proceeded." pp. 836-837.

Of course, there are many other cases announcing the doctrine that where the origin of the wrong is on the water, but the wrong is consummated on the land, admiralty has no jurisdiction; and, conversely, where the wrong originates on the land and is consummated on the water. A few of such cases are:

The Maud Webster, 8 Benedict, 547.
The Mary Garrett, 63 Fed. 1009.
Herman v. Port Blakeley Mill Co., 69 Fed. 646.
City of Milwaukee v. The Curtis, 37 Fed. 705.

In many of these cases the decision of this court in The Plymouth is cited. In that case fire, originating on the ship, was communicated to warehouses on land, and destroyed them. This wrong was held not cognizable in admiralty. The case is reported in 70 U. S. 20; 3 Wall 20; 18 L. Ed. 125. At page 128 of the Lawyers Edition, Mr. Justice Nelson, speaking for the court, said:

"We can give, therefore, no particular weight or influence to the consideration that the injury in the present case originated from the negligence of the servants of the respondents on board of a vessel, except as evidence that it originated on navigable waters—the Chicago river; and, as we have seen, the simple fact that it originated there, but, the whole damage done upon land, the cause of action not being complete on navigable waters, affords no ground for the exercise of the admiralty jurisdiction. The negligence, of itself, furnishes no cause of action; it

is *damnum absque injuria*. The case is not distinguishable from that of a person standing on a vessel, or on any other support in the river, and sending a rocket or torpedo into the city, by means of which buildings were set on fire and destroyed. That would be a direct act of trespass; but quite as efficient a cause of damage, as if the fire had proceeded from negligence. Could the admiralty take jurisdiction? We suppose the strongest advocate for this jurisdiction would hardly contend for it. Yet, the origin of the trespass is upon navigable waters, which are within its cognizance. The answer is, as already given; the whole, or at least the substantial cause of action, arising out of the wrong, must be complete within the locality upon which the jurisdiction depends—on the high seas or navigable waters."

Opposing these authorities which we have cited, the Circuit Court of Appeals in the majority opinion in the present case cites and relies upon two cases, The Anglo-Patagonian, 235 Fed. 92, and the Chiswick, 231 Fed. 452. And importance is rightly given to these two decisions because they are both decisions of Circuit Courts of Appeals. The Anglo-Patagonian was decided in the Fourth Circuit under a Virginia statute, and the Chiswick in the Fifth Circuit under a Florida statute. The majority opinion concedes that in neither of these cases was the precise point discussed. The Chiswick was a mere *per curiam* decision, the court saying only: "All the judges agree that the cause of action arising on the steamship 'Chiswick' was a maritime tort, and as it resulted in death of said Clarke within twenty to thirty minutes after his removal from the ship, the right to recover damages for such tort given by Sec. 3145, Gen. St. Fla. 1906, could be enforced, and relief given in admiralty." But even this,

meager as it is, is no authority for the court's position for, as Judge Neterer has pointed out in his dissent in the present case, the Florida statute is really a "survival act"; the right of action, given in Sec. 3145 of the Florida statutes, being by Sec. 3146 (not mentioned in the court's opinion at all) made to survive.

The error of the Anglo-Patagonian has been pointed out by Mr. Hughes in his text already quoted. The court there followed the Gye case, 207 Fed. 247, a "survival act" case, without noticing that the Virginia statute was a "death act," and without perceiving the distinction between the two.

These two cases and the "interest of humanity" are the only reasons relied on by the majority for its present opinion. We have pointed out the weakness of the cases, and, as for the interests of humanity, we say, with all due respect for the majority opinion, "humanity" cannot create a jurisdiction where it does not exist. Judge Wilbur, in writing the majority opinion, says that the admiralty courts, recognizing the deficiency of the admiralty law in not giving a right of action for wrongful death, have adopted the more humane course of "following the law of states or nations permitting such recovery where applicable." That is true, and that is what they have done. But the point is they *have* "followed the law of the states" and taken that law as they found it in the different states. Necessarily so. They could not adopt the law of the state, and then make it something different from what is was. They had to take it with its benefits and its burdens. So, where the admiralty adopts a state statute and attempts to enforce it, it has to adopt the state statute of limitations along with it. And where the state statute makes contributory negligence an absolute bar, the admiralty, if it adopts that state statute, has to depart from its own rule that contributory negligence

divides the damages, and to accept, instead, the state rule of an absolute bar. Now, in the instant case, the majority opinion has not "followed the law" of the State of Oregon at all. It has first adopted the state law to try to help out the admiralty jurisdiction, and then, to complete the process, has made the state law something entirely different from what it really is. The court itself concedes that the Oregon statute is a "death act," and then immediately, "in the interests of humanity", turns it into a "survival act" in an attempt to sustain its jurisdiction. This, we think it clear, it cannot do.

In this connection it should always be remembered, as Judge Neterer has pointed out in his dissent, that, since this is a proceeding against the ship in rem, which must rest for its base upon a maritime lien or hypothecation, the court, by its majority opinion, is attempting to extend and create a maritime lien in a case where it does not exist; and, as this court had occasion to say in *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U. S. 490, the maritime lien is "*stricti juris* and cannot be extended by construction, analogy or inference."

As far as the "interests of humanity" go, if that, in any event, could be a ground for creating a jurisdiction which does not exist, they are not present in this case. If there are any next of kin or dependents of the dead man, they could have been, and still can be, amply compensated under the Longshoremen's and Harbor Workers' Compensation Act; whereas any proceeds from this case would go to the estate; and we assume it is that fact which has induced the administratrix to speculate upon this litigation.

The majority opinion in its opening sentences, in speaking of the Kaian Maru, refers to the "death

statute" of Oregon as "a statute permitting the relatives to recover for injuries they suffer by reason of the death of a decedent." This was probably an inadvertence. At any rate, to avoid any misunderstanding, let us point out that the Oregon death act does not permit the *relatives* to recover for the injuries to the deceased. It only permits the personal representative to recover for the damages to the estate. Oregon Code Annotated, Section 5-703.

REASONS RELIED ON FOR THE ISSUANCE OF THE WRIT

The question presented is one of admiralty jurisdiction, and therefore important to be settled. The Circuit Courts of Appeals, as well as the District Courts, are in disagreement about it. The decision of the Circuit Court of Appeals for the Ninth Circuit in the present case is contrary to the decision of the Circuit Court of Appeals for the Seventh Circuit in *Rundell v. LaCampagnie Generale Transatlantique*, 100 Fed. 655. The decisions of the Circuit Court of Appeals for the Fifth Circuit in the Chiswick, already cited, and of the Circuit Court of Appeals for the Fourth Circuit in the Anglo-Patagonian, already cited, though shown, as we think, to be faulty in their reasoning, which proceeded from a failure to perceive the essential character of the state statute, nevertheless are some authority for the position taken by the Ninth Circuit in this case; which, as already shown, is different from the position taken by the Seventh Circuit.

Because of this difference in authorities, and the necessity for settling for the whole country this important question of jurisdiction your petitioner respectfully prays that this Court will issue its writ of certiorari to the United States Circuit Court of Ap-

peals for the Ninth Circuit, commanding that Court to certify the record in this cause for review and decision by this Court of the question involved.

And your petitioner will ever pray.

Erskine Wood

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Dated October 17, 1932

I, Erskine Wood, hereby certify that the foregoing petition is in my opinion well founded in law, and not interposed for delay.

Erskine Wood

ERSKINE WOOD.